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AUTHOR	Vontz, Thomas S.
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Fundamental constitutional and legal principles are central to effective instruction in the K-12 social studies curriculum. To become competent citizens, students need to develop an understanding of the principles on which their society and government are based. Few principles are as important in the social studies curriculum as due process of law. This ERIC Digest traces the history and development of due process of law, contrasts procedural and substantive due process, and highlights three World Wide Web resources helpful in teaching and learning about due process of law. (BT)

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Thomas S. Vontz

ERIC Clearinghouse for Social Studies/Social Science Education, Bloomington, IN.
Office of Educational Research and Improvement (ED), Washington, DC.

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Teaching about Due Process of Law

By Thomas S. Vontz

Fundamental constitutional and legal principles are central to effective and powerful instruction in the K-12 social studies curriculum. To become competent citizens, students need to develop a rich understanding of the principles on which their society and government rest. Few principles are as important in the social studies curriculum as due process of law. This ERIC digest traces the history and development of due process of law, contrasts procedural and substantive due process, and highlights World Wide Web resources helpful in teaching and learning about due process of law.

Origins of Due Process of Law. The idea of due process of law—that the government cannot deprive people of life, liberty, or property without previously established legal procedures equally and justly applied to all—is at least as old as the Magna Carta (1215), when King John of England was forced to promise, among other things, that "No free man shall be taken or imprisoned or disseised [deprived], outlawed, banished, or in any way destroyed, nor will we proceed against him, except by the lawful judgment of his peers or by the law of the land" (Orth 2003, 7). Due process was an important feature of many colonial charters in British North America and in statutes such as the 1641 Massachusetts Body of Liberties (Quigley and Bahmueller 1991, 619). For most of human history, however, the arbitrary and capricious judgments of rulers, not the rule of law, reigned supreme.

Although the U.S. Constitution of 1787 does not mention the words "due process of law" or "law of the land," several provisions of the original Constitution imply due process of law, such as the provisions prohibiting ex post facto laws, bills of attainder, and interference with contracts, as well as those guaranteeing trial by jury, habeas corpus, and equal status for all citizens of the states (Maddex 2002, 145). The phrase "due process of law," however, does appear in the Fifth and Fourteenth Amendments to the United States Constitution. Both due process clauses protect people from the arbitrary use of government power to deny an individual life, liberty, or property; the Fifth Amendment provision protects people from abuse by the national government while the Fourteenth Amendment clause is a prohibition on state governments.

Procedural and Substantive Due Process. How do the due process clauses of the Fifth and Fourteenth Amendments protect people from the arbitrary use of government power? The United States Supreme Court has interpreted these clauses in two distinct ways: 1) procedural due process and 2) substantive due process.

Procedural due process means that if the government is to deny people life, liberty, or property, it must follow fair and previously established legal procedures in criminal and civil cases. Civil actions, for example, often involve large property losses and therefore invoke the protections of procedural due process (Maddex 2002, 146). Public school students have a proprietary interest in attending school and must be given some procedural protections if they are to be expelled from school (West and Schamel 1991). If a state accuses an individual of a crime, the accused has certain procedural due process rights such as those guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution (Kaplan 1997, 29-30; Patrick 2001, 111).

Substantive due process has little to do with procedural fairness; rather, the Supreme Court has ruled that actions of the national and state governments that infringe upon certain fundamental rights, regardless of the procedures used in doing so, will be exposed to exacting judicial scrutiny and more often than not be found in violation of the Constitution.

The Supreme Court began using the substantive component of the Fourteenth Amendment's due process clause in the 1890's to invalidate numerous state laws that interfered with what the Court considered fundamental economic liberties (*economic substantive due process*). The Court struck down, for example, a New York law that barred bakers from working more than ten hours per day or sixty hours per week. Although the state had used fair procedures in passing and implementing the law, the substance or effect of the law violated (according to the Supreme Court in *Lochner v. New York* (1905)) a fundamental liberty—the right of consenting individuals to make contracts freely.

In 1937, the Supreme Court began overturning its economic substantive due process decisions and started giving substantive protection to other categories of rights via the Fourteenth Amendment's due process clause. Since *Palko v. Connecticut* (1937), the Court has employed this two-pronged test to guide its use of substantive due process to protect the individual's fundamental rights (Patrick 2003, 142): 1) Is the right deeply rooted in the history and tradition of our nation? 2) Is the right implicit in the concept of ordered liberty? According to these standards, if the substance, meaning, or effect of a law or action of a government infringes upon a fundamental right to liberty, then the state must show that its infringements are necessary to achieve some compelling governmental interest (Patrick 2003, 148-149). Furthermore, Justice Harlan Fiske Stone, in a footnote to the Court's opinion in a 1938 case (*United States v. Carolene Products Co.*), stated that strict judicial scrutiny could be used in cases involving (1) certain "preferred freedoms" in the Bill of Rights, 2) the rights of "discrete and insular minorities" and 3) actions of the government that tend to "seriously curtail the operation of those political processes ordinarily relied upon to protect minorities." Thus, the Court would use substantive due process to protect minority rights against infringement by majority rule (Patrick 2003, 132-133).

Thomas S. Vontz is an Assistant Professor of Education at Rockhurst University.

The Court has used substantive due process to consider whether or not specific provisions of the Bill of Rights ought to be "incorporated" through the Fourteenth Amendment's due process clause and protected against infringement by the state governments. To date, the Court has rejected former Justice Hugo L. Black's argument for total incorporation of the Bill of Rights and has opted to incorporate only fundamental rights on a case-by-case basis, a process known as "selective incorporation." Most of the rights in the Bill of Rights, however, have been incorporated and therefore nationalized. Only the Second, Third, and Seventh Amendments and parts of the Fifth and Eighth Amendments have yet to be incorporated and applied against the states.

Due process of law has become a defining feature of American constitutionalism and an inherent part of justice in the United States. Both procedural and substantive due process have been used to place constitutional limits on the powers of government to protect the rights of individuals against infringement by either the federal government or the fifty state governments (Patrick 2001, 111). Thus, due process of law, both procedural and substantive, is foundational to understanding the U.S. system of government. Teaching and learning about due process of law deserves a prominent place in the K-12 social studies curriculum, particularly in history, government, and civics classes.

World Wide Web Resources for Teaching about Due Process. See the following Web sites for ideas and information about due process of law.

U.S. Constitution Online. A comprehensive Web site about all aspects of the United States Constitution; students and teachers will find detailed information about the history and interpretation of the due process clauses of the Fifth and Fourteenth Amendments.

http://www.usconstitution.net/index.html

FindLaw. Although designed for use by legal professionals, this Web site may be used by students or teachers to obtain detailed information about the Supreme Court's interpretation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

http://www.findlaw.com/

The Bill of Rights and the Fourteenth Amendment. This Web site is an excellent resource for teachers and students who want to learn more about incorporation of the Bill of Rights. The site contains an extensive analysis of the incorporation doctrine by a leading legal theorist, Akhil Reed Amar of Yale Law School.

http://www.saf.org/LawReviews/Amar1.html

References and ERIC Resources. The following list of resources includes references used to prepare this Digest. The items followed by an ED number are available in microfiche, paper, or electronic full text from the ERIC Document Reproduction Service (EDRS). For information about prices, contact EDRS, 7420 Fullerton Road, Suite 110, Springfield, Virginia, 22153-2852; World Wide Web <edrs.com>; telephone numbers are (703) 440-1400 and (800) 443-3742. Entries followed by an EJ number, annotated monthly in CURRENT INDEX TO JOURNALS IN EDUCATION (CIJE), are not available through EDRS. However, they can be located in the journal section of most larger libraries by using the bibliographic information provided, requested through Interlibrary Loan, or ordered from commercial reprint services.

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